

**Opening Statement of the Honorable Michael C. Burgess, M.D.
Subcommittee on Commerce, Manufacturing, and Trade
Markup of the Targeting Rogue and Opaque Letters Act (TROL Act)
April 22, 2015**

(As Prepared for Delivery)

We continue to hear from a wide variety of industries that patent demand letters are a major problem. All sides of the issue believe that congressional action is an important undertaking. Finding a way forward is not easy.

A patent is a property right bestowed by the Federal government pursuant to Article 1, Section 8 of the Constitution. Any limits on patent demand letters are then limits on the first amendment free speech rights with respect to a right conferred by the government.

Patent rights are constitutionally protected and federally conferred. Patents therefore do come with the right to notify others of their existence.

Ultimately, we must insist on respecting the constitutional rights of patent holders—and in doing so, we vote today on a proposal that provides a constitutionally permissible avenue for consumer protection.

Not only are these constitutional issues necessary to protect patent ownership, ignoring them risks leaving consumers exposed to judicial uncertainty and reversal.

So caution is prudent when we try and introduce the FTC and State AGs, who are not themselves patent experts, into determining what patent holders can and cannot say.

I was at the FTC the other day talking about a number of issues. And I want to applaud the FTC for their work on the MPHJ Technologies case. But there was also talk about how, given the breadth and broadness of many patents, it is difficult to find culpability in many demand letters.

Patent breadth or broadness is NOT an issue that can be addressed through either the FTC or State AGs.

What we can try to do is identify baseless threats and deceptive acts in abusive letters and provide civil penalties where it is clear that abusive patent holders intentionally violated those bad acts. The FTC today has certain minimum knowledge requirements in order to impose civil penalties, and I believe the TROL Act to be consistent in that regard.

And civil penalty authority is significant. MPHJ was a quintessential troll and even in that case the FTC could not bring an action for civil penalties. The FTC had evidence that through 81 companies MPHJ sent over 31,000 deceptive demand letters across the country. The strongest enforcement tool available to the FTC was a settlement barring MPHJ from making deceptive representations when asserting patent rights in the future.

The TROL Act gives the FTC and State AGs the authority to go straight to civil penalties for bad faith demand letters. This is clearly a stronger position than under current law.

Our bill also identifies certain basic information that must be included in a demand letter so that letter recipients have a starting place to determine if a sender is a troll. There may be some ability to do more in this space with limited claim information. We may also be able to lower the burden of proof for penalties around disclosures in some instances. And we hope parties will work with us on these issues.

Not only do we empower state attorneys general to enforce the provisions of this legislation, the bill preserves their ability to enforce their state consumer protection laws of general applicability.

We are also preserving the FTC's ability to bring cases under its Section 5 "unfair and deceptive acts or practices" authority in deceptive demand letter cases that fall outside the scope of bad acts covered in our bill.

We have heard concerns about the affirmative defense in the bill. We will offer an amendment today to mirror the language in the Fair Debt Collection Practices Act for bona fide mistakes as was suggested by the minority witness at last week's hearing.

There is no doubt that abusive patent demand letters can wreak havoc on smaller businesses and drive up costs for consumers. I hope more stakeholders will work with us within the confines of what we can do constitutionally to provide additional avenues of enforcement.

On that note, I want to thank the stakeholders who have persisted with the legislative process. Our door remains open and we will continue to move forward. I hope that we can move forward together as opposed to splintering off and dividing at a crucial time.

With an eye towards protecting small businesses and consumers within the constitution I hope my colleagues will join me in advancing this bill today.

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